STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED January 13, 2005
v	No. 250074 Calhoun Circuit Court
WILLIAM DENNIS NOBLE, Defendant-Appellant.	LC No. 02-004122-FH

Before: Jansen, P.J., and Murray and Donofrio, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of possession with the intent to deliver more than 225 grams but less than 650 grams of cocaine (count I), MCL 333.7401(2)(a)(ii); fourth degree fleeing and eluding (count II), MCL 750.479a(2). Defendant was sentenced as an habitual offender, second offense, MCL 769.10, to prison terms of 225 months to 45 years on count I, and 21 to 36 months on count II, with the sentences to be served consecutively. Defendant now appeals as of right.[1] Defendant claims underrepresentation of African-Americans in the composition of the jury venire and claims ineffective assistance of counsel for failing to object to the jury venire in that regard. In the absence of plain error, probability that the result of the proceedings would have been different, and that the proceedings were fundamentally unfair, we reject the claims. Because a legitimate detention was in progress and defendant's fleeing and subsequent arrest established sufficient probable cause to search incident to the arrest, the motion to suppress the evidence seized in the search was properly denied. The claim for ameliorative sentencing is without merit. Similarly, the claims that the trial court erred in admitting drug profiling testimony, hearsay evidence, and that counsel was ineffective with regard to each claim lacks merit. We affirm.

This case arises from a traffic stop that eventually resulted in the discovery of cocaine. Defendant was riding as a passenger in his van, driven at the time by defendant's friend, Ms. Brown. At trial, State Police Trooper Frank Williams testified that he originally stopped defendant's van because it did not have tail lights. The trooper stated that when he asked for

[1] Defendant's appointed counsel has filed a brief on appeal, and defendant has filed a supplemental brief pursuant to Administrative Order No.1981-7, § 4(11) ("Standard 11").

both occupants' identification, defendant seemed extremely nervous and that his hand was visibly shaking. Trooper Williams asked Ms. Brown to step out of the vehicle, purportedly to show her the tail light. Trooper Williams testified that he questioned Brown about where they were traveling from, to which she answered first Detroit, and then Fort Wayne. Based on the two responses, Trooper Williams asked the same question of defendant to which he answered "Chicago." Based on the inconsistency, Trooper Williams asked for defendant's consent to search the vehicle, to which defendant agreed. Trooper Williams called for another officer, but before the search began, defendant ran to the van and drove off. He was apprehended some fifteen minutes later and immediately arrested for fleeing and eluding. A search of the van was made which turned up the cocaine.

On appeal, defendant first argues that he was denied a fair trial because the jury was not drawn from a venire representative of a fair cross-section of the community. We disagree.

Questions concerning the systemic exclusion of minorities in jury venires are reviewed de novo. *People v Hubbard (After Remand)*, 217 Mich App 459, 472; 552 NW2d 493 (1996). A criminal defendant is entitled to an impartial jury drawn from a fair cross section of the community. *Hubbard, supra* at 472. To establish a prima facie violation of the fair cross-section requirement, the defendant bears the burden of proving "that a distinctive group was underrepresented in his venire or jury pool, and that the underrepresentation was the result of systematic exclusion of the group from the jury selection process." *People v Smith*, 463 Mich 199, 203; 615 NW2d 1 (2000).

However, to properly preserve a challenge to the jury array, a defendant must raise this issue before the jury is empanelled and sworn. *People v Dixon*, 217 Mich App 400, 404; 552 NW2d 663 (1996). Here, defendant, on appeal, concedes that the issue is unpreserved as he failed to object prior to the panel being sworn. Accordingly, as unpreserved constitutional error, the record is reviewed for plain error that affects the substantial rights of the defendant. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999); *People v Davis*, 250 Mich App 357, 368; 649 NW2d 94 (2002).

There is no evidence in the lower court record to support defendant's allegations that African-Americans were excluded from defendant venire or jury pool except for the affidavit of Mrs. Noble offered in support of defendant's motion for a new trial. Therein, Mrs. Noble states:

> During my attendance of the trial for Mr. William D. Noble, which began on May 13, 2003, 37th circuit court, in Battle Creek, Michigan, I observed that none of the potential jurors were African American. In reference to the fair practice phrase, "Jury of your Peers" the age group was also questionable.

Though this affidavit does provide evidence that no African-Americans were part of the jury venire, there is simply no evidence that such underrepresentation was the result of systematic exclusion of the group from the jury selection process. To show systematic underrepresentation, it must be shown that underrepresentation of the particular group is "'inherent in the particular jury-selection process utilized.'" *Smith, supra* at 205, quoting *Duren v Missouri*, 439 US 357, 364; 99 S Ct 664; 58 L Ed 2d 579 (1979). Nothing in the record indicates the system used to select jurors or how that system creates underrepresentation. In his appellate brief defendant merely makes the assertion that African-Americans are

underrepresented on juries in Calhoun County but fails to cite any evidence, either within or outside of the trial record, supporting this assertion. Accordingly, we do not find plain error here.

Defendant next argues that he was deprived of the effective assistance of counsel, arguing that his trial counsel should have objected to the composition of the jury venire.[2] We disagree.

To establish ineffective assistance of counsel, defendant must show that counsel's performance fell below an objective standard of reasonableness under prevailing professional norms, that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different, and the attendant proceedings were fundamentally unfair or unreliable. *People v Rodgers,* 248 Mich App 702, 714; 645 NW2d 294 (2001).

As discussed earlier, the lower court record contains no evidence of any systemic exclusion of African-Americans from the jury pool. Nor has defendant presented any such evidence on appeal. Therefore, defendant has failed to show a reasonable probability that the result would have been different.

Next defendant argues that the trial court erred in denying his motion to suppress the evidence seized from the van. Defendant specifically argues that he was free to leave after the officer completed his LEIN check, and that in driving off in the van, defendant did not break any laws, including fleeing and eluding. Therefore, the subsequent arrest, and the search made incident to the arrest, were tainted and the evidence seized in that search should be suppressed under the exclusionary rule.

The requirements have been established for a valid investigatory stop to be consistent with constitutional protections:

> The brief detention of a person following an investigatory stop is considered a reasonable seizure if the officer has a 'reasonably articulable suspicion' that the person is engaging in criminal activity. The reasonableness of an officer's suspicion is determined case by case on the basis of the totality of all the facts and circumstances. "[I]n determining whether the officer acted reasonably in such circumstances, due weight must be given, not to his inchoate and unparticularized suspicion or 'hunch,' but to the specific reasonable inferences which he is entitled to draw from the facts in light of his experience.'
>
> Although this Court has indicated that fewer facts are needed to establish reasonable suspicion when a person is in a moving vehicle than in a house, some minimum threshold of reasonable suspicion must be established to justify an investigatory stop whether a person is in a vehicle or on the street. [*People v*

[2] On appeal, defendant makes the blanket statement that his trial counsel erred in failing to preserve the error discussed on appeal. However, defense counsel did move to suppress evidence at trial and did raise the issue of consecutive versus concurrent sentences at the sentencing hearing.

LoCicero (After Remand), 453 Mich 496, 501-502; 556 NW2d 498 (1996) (internal citations and fotnotes omitted).]

Defendant does not challenge the initial stop for the tail lights. Neither does defendant challenge the brief detention to run a LEIN check. Rather, defendant challenges the officer's actions of asking Ms. Brown, the driver of the vehicle, to step out of the car and his asking both Brown and defendant questions of where they were traveling from.

Defendant argues that defendant's nervousness alone does not justify asking Brown to step down from the vehicle and ask her where they were coming from. Defendant cites *United States v Boyce*, 351 F3d 1102 (CA 11, 2003), for the proposition that nervousness alone does not amount to reasonable suspicion. However, as plaintiff points out, in *People v Oliver*, 464 Mich 184; 627 NW2d 297 (2001), cert den 534 US 116 (2002), our Supreme Court, relying on *Illinois v Wardlow*, 528 US 119, 124; 120 S Ct 673; 145 L Ed 2d 570 (2000), stated that merely evasive or nervous behavior may be sufficient to support a finding of reasonable suspicion of criminal activity.[3]

Once Brown and defendant gave different answers, the trooper had further reasonable suspicion to continue the detention for further inquiry in order to confirm or dispel his suspicion that criminal activity was afoot. *People v Yeoman*, 218 Mich App 406, 410-411; 554 NW2d 577 (1996). Accordingly, at the time defendant jumped in the van and drove off, a legitimate detention was in progress, thereby giving rise to probable cause to the subsequent arrest of defendant for fleeing and alluding, as well as the search incident to that arrest. *People v Eaton*, 241 Mich App 459, 463; 617 NW2d 363 (2000). Accordingly, the ultimate search of the vehicle was proper.

Next, defendant claims the court erred in sentencing defendant under provisions in effect at the time of the offense, as opposed to under the ameliorative sentencing provisions in effect at the time of sentencing. We disagree.

Recently, a panel of this Court addressed this very issue with regards to the same statute implicated here. In *People v. Doxey*, 263 Mich App 115; 687 NW2d 360 (2004). a panel of this Court held that 2002 PA 665 "applied prospectively only and only to offenses committed on or after the effective date of the legislation, March 1, 2003." *Id*. at 122. In reaching this conclusion, the Court rejected the argument that defendant makes here. We too reject the argument and are bound by that decision. MCR 7.215(J)(1).

Next defendant argues that trial counsel was ineffective in failing to present evidence regarding the existence of video recording equipment inside of the vehicles of the state troopers.

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[3] We note that to the extent that authority cited by defendant conflicts with *Oliver, supra*, this Court is bound to follow our Supreme Court over a federal court (other than the United States Supreme Court) even on issues of federal constitutional law. MCR 7.215(J)(1); *People v Harris*, 470 Mich 882; 681 NW2d 653 (2004), citing *Abela v General Motors Corp*, 469 Mich 603; 677 NW2d 325 (2004) (State courts are not bound by decisions of the federal courts, other than the United States Supreme Court, even when construing federal law or the US Constitution.)

As long as counsel made a complete investigation, a decision on what evidence to present is a matter of trial strategy. *Wiggins v Smith*, 539 US 510, 521-522; 123 S Ct 2527; 156 L Ed 2d 471 (2003). Here, early on, defense counsel made a demand for discovery and disclosure and specifically sought any audio/video recordings taken during the traffic stop. Defense counsel also made a verbal request to the assistant prosecutor for the material and finally moved to compel discovering seeking any video. We find, therefore, that defendant's investigation was sufficient and his decision whether to present this evidence should not be second guessed. *People v Stewart (On Remand)*, 219 Mich App 38, 42; 555 NW2d 715 (1996).

Defendant also argues that defense counsel was ineffective in failing to object to the hearsay testimony of the state trooper, testifying as to the admissions defendant made once in custody. MRE 801 states that "'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." However, more specifically applicable to the witness' testimony here, MRE 801(d)(2) states, "[a] statement is not hearsay if . . . [t]he statement is offered against a party and is . . . the party's own statement . . . ." Accordingly, Trooper Williams' testimony was not hearsay and counsel did not err in not objecting to it as counsel is not required to advocate a meritless position. *People v Riley*, 468 Mich 135, 142; 659 NW2d 611 (2003).

Defendant next argues that the trial court improperly admitted drug profile evidence. We disagree.

Drug profile evidence is an "informal compilation of characteristics often displayed by those trafficking in drugs," *Hubbard, supra*, 209 Mich App 239, quoting *United States v Campbell*, 843 F2d 1089, 1091 (CA 8, 1988), or a listing of characteristics that in the opinion of law enforcement officers are typical of a person engaged in a specific illegal activity. *Id.*, at 239, quoting *United States v McDonald*, 933 F2d 1519, 1521 (CA 10, 1991). In *Hubbard, supra*, we held that under MRE 403, drug profile evidence is not admissible as substantive evidence of guilt.

Again defendant points to the testimony of the state trooper regarding the custodial interrogation of defendant. Defendant also points to the testimony regarding the background and credentials of the arresting officers. None of this testimony presents characteristics of those trafficking drugs and therefore is simply not drug profile evidence.

Next defendant argues that his trial counsel's conviction for a drug related offense represents a conflict of interest and has the effect of depriving him assistance of counsel under the sixth amendment. However, there is no evidence in the record that defense counsel was charged or convicted of a crime. "This Court's review is limited to the record established by the trial court, and a party may not expand the record on appeal." *Sherman v Sea Ray Boats, Inc*, 251 Mich App 41, 56; 649 NW2d 783 (2002), citing *Reeves v Kmart Corp*, 229 Mich App 466, 481 n 7; 582 NW2d 841 (1998).

Finally, defendant argues that the cumulative effect of several errors constitutes sufficient prejudice to warrant reversal. We disagree.

In order to reverse on the basis of cumulative error, the effect of the errors must be seriously prejudicial in order to warrant a finding that the defendant was denied a fair trial.

People v Ackerman, 257 Mich App 434, 454; 669 NW2d 818 (2003). However, only actual errors are aggregated to determine their cumulative effect. *People v Rice (On Remand)*, 235 Mich App 429, 448; 597 NW2d 843 (1999). Because, as outlined above, defendant fails to show any errors, defendant cannot sustain his claim that the cumulative effect of multiple errors requires a new trial. *People v LeBlanc*, 465 Mich 575, 591-592; 640 NW2d 246 (2002).

Affirmed.

/s/ Kathleen Jansen
/s/ Christopher M. Murray
/s/ Pat M. Donofrio